



## CHAMPAGNE and AISHIHIK First Nations

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March 26, 2015

Blake Richards, MP – Wild Rose  
Chair Standing Committee on Aboriginal Affairs and Northern Development  
House of Commons  
Ottawa, Ontario  
Canada, K1A 0A6

Dear Blake Richards,

**Re: Proposed Amendments to the *Yukon Environmental and Socio-economic Assessment Act (Canada)*[YESAA] through Bill S-6: An Act to amend the Yukon Environmental and Socio-economic Assessment Act and the Nunavut Waters and Nunavut Surface Rights Tribunal Act**

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This letter is provided as a supplement to our presentation to the *Standing Committee on Aboriginal Affairs and Northern Development*, March 30<sup>th</sup>, 2015. I would like to thank you for providing Champagne and Aishihik First Nations (CAFN) the opportunity to present our views in person in the Yukon. This letter is intended to reaffirm and provide further explanation of our concerns with certain proposed amendments to the YESAA under Bill S-6. I trust you will give full and fair consideration to CAFN's comments and issues before concluding the Committee's report back to the House of Commons.

### 1. Introduction

Our comprehensive land claim agreement entrenched a relationship between Canada, the Yukon and CAFN. In consideration for the extinguishment of certain rights, titles and interests to significant portions of our territory, we agreed to the bundle of rights, titles and interests set out in our agreement. A significant consideration was the surrendering of Aboriginal title to more than 90% of our land in exchange for CAFN's guarantee of a meaningful role in the management and decision-making throughout our territories. A critical piece of this bargain was the Development Assessment provisions of Chapter 12, which was, and is, the foundation for the *Yukon Environmental and Socio-economic Assessment Act*. Certain proposed amendments set out in Bill S-6 fundamentally alter the development assessment process negotiated by the parties under the framework of Chapter 12.

Bill S-6 is comprised of two distinct types of proposed amendments: (1) those that flow from comprehensive tri-partite discussions through the Five-Year Review, as mandated under 12.19.3 of the CAFN Final Agreement; and (2) those that arose more recently and unilaterally by Canada which flow from Canada's larger ambitious legislative agenda that purports to improve the northern regulatory regime. Canada cannot unilaterally make substantive changes to YESAA that are outside the scope of the amendments contemplated during the Five-Year Review process, without substantively consulting with Yukon First Nations about those amendments. In our view, Canada took a clear step backward with its propositions and its effort to engage meaningfully when these later amendments were introduced. For these provisions, Canada failed to uphold its constitutional duty to consult and accommodate CAFN's concerns, where necessary.

Recently, Justice Veale of the Yukon Supreme Court in the case known as the Peel Watershed Decision<sup>1</sup> reinforced the principles of the Crown's duty to consult in the context of Final Land Claim Agreements. Veale J. held that the Crown cannot act unilaterally in government-to-government processes developed collaboratively with First Nations with the goal of reconciliation:

[194] There is another aspect to this exchange or dialogue. If there is to be a meaningful Consultation with First Nations, the Government is obligated to put something on the table and consider the First Nations response to that offering, before submitting the proposed modifications to the Commission. In my view, the proposed modifications must be addressed in the Consultation process preceding the response to the Commission. The Government of Yukon must fully and fairly consider the views of the First Nations on the proposals and turn its mind to possible accommodations before it submits proposed modifications with written reasons to the Commission.

Furthermore, Veale J. reinforced the principle that when consultation occurs under the framework of a Land Claim Agreement, the context of the treaty must be given large, liberal and contextual interpretation with the goal of reconciliation. Veale J. expressed this principle at paragraph 145:

[145] I have previously set out the words of Chief Justice McLachlin in *Haida Nation* and *Manitoba Métis* as well as those of Binnie J. in *Little Salmon/Carmacks* which stress the importance of interpreting land claims agreements in a manner that furthers the objective of reconciliation. Treaties are as much about building relationships as they are about the settlement of past grievances. They are to be interpreted in a manner that upholds the honour of the Crown. Both parties agree that they must be given a large and liberal interpretation consistent with the objectives of the treaty.

Members of the House of Commons including the Minister of Aboriginal Affairs and the MP for Yukon, as well as witnesses before the Senate Committee on Energy, the Environment and Natural Resources (Sept.-Oct. 2014), have suggested there were thousands of hours of consultation with Yukon First Nations on these specific amendments. This is misleading. In fact, the four contentious amendments were not provided in writing in the draft Bill until February 26<sup>th</sup>, 2014; less than 2 months to consider before the imposed deadline of April 23<sup>rd</sup>, 2014.

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<sup>1</sup> *The First Nation of Nacho Nyak Dun v Yukon (Government of)*, 2014 YKSC 69.

The consultation process agreed to by the parties for the Five Year Review was effectively displaced by the amendments that were put forward unilaterally by federal representatives, separate and apart from the Five Year Review process established in the Final Agreement.

We consistently requested a representative working group process to jointly consider and draft proposed amendments to Bill S-6, similar to what took place during the Five-Year Review, in order that the approach would be consistent with the spirit and intent of our Treaty. In response, we were promised by Deputy Minister Michael Wernick's, by letter dated February 21, 2013, and later by Minister Valcourt in his letter addressed to Grand Chief Ruth Massie dated September 23, 2013, that they would support a working group with our First Nations to focus on legislative and regulatory changes. Such a working group was never established.

It is important that greater scrutiny be applied in the evidence regarding the level, depth, and substance of engagement with First Nations on the specific proposed amendments, which were introduced late in the process. Different types of engagement took place; most, if not all, could be characterized as simple notification with little to no willingness by Government to discuss and negotiate possible alternatives. The environment that was set up for these engagement sessions discouraged, and in some cases prohibited, constructive dialogue.

We have consistently sought meaningful engagement to negotiate these matters but Canada has yet to demonstrate it will give full and fair consideration of the views of Yukon First Nations. We have been stonewalled with clear signals that these amendments are not up for negotiation. This approach is completely contrary to the law on what consultation actually requires. For example, Veale J. in the Peel Watershed Decision states that the Crown cannot simply go through the motions of working with First Nations and then act on their own. Nonetheless, we have offered practical solutions to these concepts that do not necessitate legislative action but could be addressed by other means, and in some cases, point back to the better thought out solutions already agreed to under the Five Year Review. To date, we have been incredibly frustrated that our reasonable requests and observations have been treated with little, to no, regard.

The unilateral amendments proposed by Canada purport to bring certainty and consistency to the northern regulatory regimes in order to promote northern economic development. However, we are sceptical that these ambitions will be achieved. In fact, we assert these amendments will have the opposite effect. If these amendments proceed as presented in Bill S-6, certain First Nations have expressed a desire to commence legal action to challenge the constitutionality of Bill S-6.

We are equally interested, if not more so, in ensuring the Yukon is a predictable and low risk jurisdiction to pursue economic and community development. We are vested within and form a major part of the Yukon economy. We feel we have a collective interest with all of the Yukon in this regard, including the objective of an effective and efficient assessment regime. The claim that our assessment regime requires these changes because of the uncertainty it creates to investors is not supported by our First Nations. Furthermore, we know a wide range of stakeholders in the Yukon are also opposed to these damaging proposed amendments, for example, as expressed by letters to the Minister by: the **Casino**

**Mining Company, Kaminak Gold, Till Capital Corporation** (a major investors in **Golden Predator**), the Yukon Chamber of Commerce, the Tourism Association of the Yukon, and the **Wildlife Conservation Society of Canada**. At the Association of Mineral Exploration, BC 2015 Mineral Round Up Conference in Vancouver, we heard loud and clear the mining and mineral exploration sector is concerned about the uncertainty these amendments will bring and we received clear signals that industry wants to see the Parties to our Treaties take the time to negotiate a solution that is acceptable to all, and not see the matter be taken to the courts.

The Government has been insisting these changes are required across the nation in order to harmonize with other regimes. This nationally dictated mandate is in sharp contrast to the made-in-Yukon approach that YESAA emerged from. This interest cannot undermine the original intention of the distinct environmental assessment regime that Canada, the Yukon and Yukon First Nations mutually agreed to under the Final Agreements. A major reason YESAA was developed was to replace the legislative regime which applied across all of Canada (i.e. the *Canadian Environmental Assessment Act*) with a regime that reflected the distinct nature of how we envisioned development assessment in the Yukon Land Claims context. In particular, the development assessment process that was developed was intended to be independent and act at arm's length from Yukon First Nations and the Federal and Territorial Government. The assessment process was also designed to reflect the regional and cultural distinctiveness in the Yukon. In no way do the aspirations to harmonize regimes across the north and more broadly across Canada reflect the spirit and intent of our treaty. The objective to maintain the intent of our Treaty must be and remain paramount over any unilateral ambitions to harmonize regimes.

The matter of YESAA reflecting the interests of all the Parties to the Final Agreements was well understood by the majority of Parliamentarians when Bill C-2 (i.e. YESAA) was introduced. The Member of Parliament (Yukon) who introduced the Bill noted that without Bill C-2, there could be as many as 16 different environmental assessment regimes in the Yukon; one for each of the 14 First Nations, one for Canada and one for Yukon. A lot of dedication and effort was put into negotiating the original legislation and its subsequent required Five Year Review recommendations and we do not want to see the effort to build a successful regime be compromised.

## **2. CAFN Does Not Consent to the Proposed Amendments**

Below we express our serious concern about the amendments proposed outside the Five-Year Review and Canada's failure to meaningful consult with CAFN.

### **a) Binding Policy Direction to the Board**

Proposed Amendment #34 to add a new Section 121.1 after Section 121 of YESAA

We are opposed to any amendment that provides authority for the Minister of Aboriginal Affairs and Northern Development Canada (AANDC) to unilaterally issue binding policy directions to the Yukon Environmental and Socioeconomic Assessment Board (*hereafter referred to as; the "Board"*) with respect to any of the Board's powers, duties or functions. The assessment process must remain neutral.

Under this proposed amendment, there is no requirement for the AANDC Minister to obtain the consent of First Nations before issuing policy direction to the Board, only mere notification.

Providing the AANDC Minister with authority to unilaterally issue policy direction undermines the independence of the Board and Designated Offices when conducting assessments. Neutrality is fundamental to the effectiveness of the YESAA and has been discussed at length by the Council of Yukon First Nations (CYFN), Canada and Yukon during the development of the YESAA. Providing a single party with authority to direct the Board is contrary to the spirit and intent of the YESAA and the Final Agreements and significantly undermines CAFN's confidence in the certainty of the assessment process, which can now be changed at any time by unilateral federal action.

During the Five Year Review, the concept of one Party having the powers to give binding policy direction was never raised. In fact, during the Five-Year Review, Canada, the Yukon, Yukon First Nations and the Board discussed a range of matters which were policy-based improvements for how the Board carries out its administrative and procedural duties. This resulted in a large number of recommendations that the Parties agreed to which the Board has already begun carrying out to improve its procedures and practices. Furthermore, the Board has undertaken the development of proponent guidance documents, including sector specific guidance documents and forms, and reviews and revisions to its by-laws pursuant to sections 35 and 36 of YESAA in order to address matters such as having consistency among its Designated Offices. Some witnesses testified to the Senate Committee they believe a legislative change is not a solution to address matters related to YESAB policy and procedures, (for example; consistency among Designated Offices), as they recognize the Board already has by-law making authority and has established a broad range rules and procedures to address issues as they may arise.

Our treaty expressly states that the Board and its Designated Offices may develop its own procedures and rules. It is important the Board continues to maintain its arms-length and independent ability to function and it utterly unacceptable that the Government parties to our Final Agreement would have unilateral authority to administer policy direction to the Board. Section 8 of YESAA establishes the fundamental principle that half of the Board is comprised of representatives nominated by the Council of Yukon First Nation. Our representation on the Board can be made meaningless by Canada's grant to itself of sweeping powers to dictate the Board's process. This is a fundamental breach of Chapter 12.

#### **b) Delegation of Federal Powers**

##### *Proposed Amendment #2 to Section 6 of YESAA*

This proposal is another amendment that does not come from the Five-Year Review. It was not until the later stages of the engagement process that Canada identified this concept within the amendments.

We do not support any amendment that would allow the AANDC Minister to delegate any or all of his or her powers, duties and functions under the YESAA to the territorial Minister. Along with the CYFN, we have several concerns relating to this proposed amendment. There is no requirement for the AANDC Minister to obtain the consent of Yukon First Nations before delegating any powers, duties or functions. The AANDC Minister only has to provide notice to the Yukon First Nations.

This amendment constitutes a fundamental change in the distribution of powers in development assessment – creating a bilateral federal-territorial process that is inconsistent with the intent of the Final Agreements. This provision would exclude Yukon First Nations from full engagement and decisions about future re-distributions of powers, duties and functions under the YESAA, which can very significantly affect First Nation treaty rights, treaty settlement lands, and the decision-making authorities of First Nations. This is inconsistent with the convention and practices that resulted in the creation of YESAA, as well as what has been agreed to in other processes like the Devolution Transfer Agreement.

The importance of preserving the balance of power in order to achieve the purposes of Chapter 12 of the Yukon First Nations Final Agreements was commented on by the Supreme Court of Canada in: *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 SCR 103, (the “LSC Case”) by LeBel and Deschamps JJ. in reasons delivered by Deschamps J. at para. 179. He said:

*One objective of Chapter 12 of the final agreements concluded with the Yukon First Nations is to ensure the implementation of a development assessment process that “provides for guaranteed participation by Yukon Indian People and utilizes the knowledge and experience of Yukon Indian People in the development assessment process” (s. 12.1.1.2). This framework was designed to incorporate both the participation of the First Nations and a certain degree, if not of decentralization, at least of administrative deconcentration. These objectives are achieved through the membership of the bodies established in Chapter 12 of the final agreements and the YESAA, and through the oversight by those bodies of development activities planned for the territory in question. (emphasis added)*

The information provided by Canada does not give any rationale for establishing significant powers for the Yukon Government relative to First Nation governments. The addition of 6.1(1) to allow delegation by the federal minister could have significant impacts on First Nations. For instance, if the federal minister were to delegate his/her ability to appoint board members to Yukon Government, the Yukon would effectively be appointing 2 out of 3 executive committee members on the board. This is only one example of a potential shift in power that could result from the proposed delegation provisions. The federal minister has a range of discretionary powers and under YESAA, it could delegate to the Yukon Government if this amendment was enacted, impeding the fundamental balance of power contemplated in the Final Agreement. In concert with proposed amendment #1 discussed above, it could allow the Yukon Government to dictate Board process for political expediency. From CAFN’s perspective, this is a profound breach of our Treaty rights.

**c) Maximum Timelines for Assessments**

Proposed Amendments:

#21 to Section 66 of YESAA;

#23(2) as an added clause after Section 74(2), of YESAA

and the portions of #16 and #17 that pertain to time line amendments to Section 56(1) to and Section 58(1) of YESAA;

The proposals to establish maximum timelines were introduced late in the engagement process in 2013 and did not arise from the Five-Year Review. During the engagement meeting in November 2013, officials had assured our First Nation that the timelines would not include the adequacy review stage. Some witnesses to the Senate Committee have commented on the need to include the adequacy stage in the maximum timelines. It is not realistic to attribute problems with assessments taking a long time solely due to how the Executive Committee or Designated Offices carry out this stage. We point out there is a great deal of responsibility that should fall on the proponent for submitting thorough and complete project proposals. Many projects have long timelines through the Board because proponents do not submit complete information, requiring the assessors to carry out several adequacy reviews.

The Board has developed rules for timelines that, for the most part, work very well for projects and the designated offices have worked very hard to achieve these timelines. In most instances, the Board performs better than the proposed maximum timelines. Assessors require means to work with the decision bodies and proponents on addressing timelines at the Executive Committee and Panel Review stages. Requiring Ministerial approval or an Order-in-Council for extensions adds an unwieldy and unnecessary step for proponents. No reasonable explanation, other than the federal action plan agenda to harmonize across the country, has been given.

Imposing 15 month timelines for screenings by the Executive Committee and 18 month timelines for Panel Reviews do not provide sufficient time to ensure an adequate assessment is carried out, especially in order to meet the requirements of thorough and meaningful participation by affected First Nations to ensure the required input is brought into the assessment of projects – a process that the Federal and Territorial Government often rely on to fulfill most of its duties for consultation.

Furthermore, the provisions for granting timeline extensions will be unwieldy and will also be subject to political interference, real or perceived.

Note, there has never been a Panel Review conducted under YESAA and the Parties do not have a reasonable understanding on what would be an appropriate timeline for a Panel Review in the Yukon. The Objectives of Chapter 12 will guide a Panel when it establishes its terms of reference. Furthermore, the timelines proposed are not consistent with other jurisdictions, including the allowance for 24 months with possible extensions as established under the Canadian Environmental Assessment Act (2012).

**d) Exemptions for Renewal and Amendments for No Significant Change**

Proposed amendment #14 to add Section 49.1(1 and 2) after Section 49 of YESAA

The issue of project renewals and amendments was discussed during the Five year review but the parties had considered the problem was mainly due to smaller, shorter term projects (such as projects triggered by air emissions permits, landfill permits) and had not contemplated all types of projects. The concept of a blanket provision that would exempt all project renewals and amendment from requiring assessment was never discussed during the Five-Year Review and only brought in during the later stage of the engagement in 2013.

The exemption to assess existing projects is far too broad and sweeping in its application. This will prevent a wide range of assessments and fails to acknowledge the impact of cumulative effects. Better alternative solutions have been discussed and agreed to by the Parties during the Five year review (i.e. Recommendation 15(b)).

The concept of only considering whether the project has changed significantly ignores the fact that social, economic, and environmental conditions and /or societal values in which those projects occur may also change significantly over time. This should also be a central tenet in considering when assessments are required for project renewals. This proposed change to YESAA would allow projects that do not change significantly (such as a hydroelectric dam) to go through re-licensing without assessment, even though a wide range of conditions may significantly change over time, including: climate change effects, evolution in scientific and technology or traditional knowledge of possible impacts and available mitigation tools, understanding of changes to environmental conditions, cumulative effects, and changes to societal values. All of these contribute to defining the magnitude and significance effects of a project, even when a project may not change significantly over time. It is therefore important that longer term projects are re-assessed periodically, even if the project remains the same. The proposed provision does not address this substantial issue and will operationally conflict with the amendments related to cumulative effects.

The proposed amendment also ignores the fact that it will be incredibly problematic for assessors to determine the scope of the project to assess, as the temporal scope will be indeterminate. This would force assessors to determine impacts and significance to extremely long and ungainly time periods. It will also present significant challenges to proponents in preparation of their project submissions. This creates an unrealistic challenge for the assessors, as they will have to deal with significant uncertainty which may lead to the determination that impacts are unknown (resulting in Designated Offices passing on assessments to the Executive Committee) or the determination that the project will have affects that cannot be mitigated, resulting in a greater number of recommendations of projects not proceeding or further delays on the completion of project assessments. This would certainly not be a desirable outcome for anyone.

During the Five-Year Review, the parties established a technical working group to discuss this scoping issue in detail. They provided a recommendation that was accepted by the parties who agreed that it is not reasonable to create specific constraints related to temporal scoping and terms of authorizations. Neither the working group nor the parties were able to identify any solution that would be appropriate for all types of projects. Instead, the parties recognized that the existing YESAA wording provides flexibility for assessors to establish temporal scopes that are appropriate for each project, and proposed that the issue should be addressed through revisions to assessors' policies and approaches for project scoping. As stated in the Draft Interim Review Report (from recommendation 15(b), p.24):

*“For some projects, temporal scopes that are consistent with regulatory authorizations may be appropriate (e.g. for projects with environmental and socio-economic effects that are difficult to predict, or projects with changing adjacent land use conditions). In other cases, it may be appropriate to consider project scopes that exceed the duration of specific*



*authorizations (e.g. activities and projects that require a series of short duration authorizations, activities and projects with well understood effects that are unlikely to change). YESAB scoping guidance, practices and policies should provide flexibility for assessors and identify appropriate conditions for applying different approaches to the temporal scoping of projects.” (Draft Review Report – Interim. 2012)*

The parties agreed on the actions that should be taken to address the issue:

*“Future discussions should include a joint examination of YESAB’s policies and/or practices on temporal scoping with a specific goal of developing a policy or practice that allows an assessor to apply appropriate temporal scopes to projects regardless of the length of the associated authorization.” (Draft Review Report – Interim. 2012)*

With the proposed amendment, Yukon Government and Canada are now backtracking on the agreement reached in the Five-Year Review. The proposed amendment as it currently reads in Bill S-6 would eliminate the existing flexibility that the parties agreed was appropriate.

If for any reason, it was actually agreed to by all the Parties, to ensure there were prescriptive requirements defined under the regulations or legislation, it would be far more appropriate that this issue be addressed under amendments to the Assessable Activities Regulations of YESAA. The current regulations have language that identifies project triggers for project ‘modifications’, ‘operation’, ‘abandonment’, and ‘decommissioning’. Such language could be modified for certain projects to address the issue of short-term projects. There are examples in other jurisdictions whereby regulatory tools are used, instead of legislation, for defining what particular conditions must be met to have exemptions of environmental assessment during regulatory renewals (e.g. Ontario). This would allow for greater flexibility and would provide an easier means to make amendments over time.

Finally, providing the Decision Body to determine whether a project has changed significantly will only arouse controversy and be subject to challenges. We envision such discretion will not create a level playing field in the Yukon. It will be further complicated when more than one Decision Body is to determine if a project should be subject to assessment. The proposed clause 49.2 does not provide enough detail on how disputes would be resolved, even when consultation arises. What will the standard be if agreement cannot be reached?

The overall effect of the proposed amendment #13 is to reduce and undermine the participation of CAFN in development assessment. This is contrary to section 12.1.1.2 of the Final Agreement which states that a development assessment regime shall be negotiated by the parties which “provides for guaranteed participation by Yukon Indian People and utilizes the knowledge and experience of Yukon Indian People in the development assessment process”.

### **3. Additional Matters**

Relying on Section 4 of the YESAA on matters related to consistency with the Treaties: Some Members of Parliament, some Senators, and witnesses to the Senate Committee on Energy, the Environment and

Natural Resources, noted that Section 4 of the YESAA protects against the infringement of our Treaty Rights. The provision reads:

*“In the event of an inconsistency or conflict between a final agreement and this Act, the agreement prevails to the extent of the inconsistency or conflict.”*

We stress that it is essential for the Government take whatever steps necessary to ensure the amendments are consistent with our Final Agreement and should not rely on this general provision, given that our Treaty rights are at stake. It is not enough to default to this provision considering we raised these concerns early in the process. CAFN holds the view that legal action will be necessary if the government continues to dismiss our concerns about the amendments. This is certainly not a desirable approach to addressing these matters and in our view is a breach of the honour of the Crown.

#### **4. Conclusion**

To summarize, we are not opposed to those amendments which clearly arose through substantial discussion, negotiation and compromise through the Five Year Review. Although we did not get the specific language we would have preferred to see in some of those amendments that flowed from the Five-Year Review, we recognize that we are partners in this process and compromise and reasonableness is sometimes necessary as part of our long-term reconciliation, relationship and nation building. However, we are deeply concerned, and as stated throughout this letter, fully opposed to the inclusion of certain amendments which did not come from engagement that meets the Treaty and common law principles of consultation, and which have the effect of breaching our Treaty rights.

Notwithstanding the fact the Government failed to meet the test of its Constitutional and common law duties to consult and accommodate, and the fact that its actions to date have not met the requirements of the Honour of the Crown, we strongly urge the Committee, in their report back to the House of Commons, to recommend adoption of amendments to Bill S-6 that, at a minimum, will remove:

- ❖ Provision #34 (**binding policy direction**) which adds a new section, 121.1 after section 121 of YESAA;
- ❖ The Part of Provision #2 (**delegation**) which adds a section, 6.1, after section 6 of YESAA;
- ❖ Provision #16, #17, and #23(2) (**maximum timelines**) which replaces; section 56(1), section 58(1), and adds 4.1-4.4 inclusive after section 72(4) of YESAA, respectfully;
- ❖ Provision #14 (**exemption from assessments-project renewals and amendments**) which adds a section, 49.1(sub-sections 1 and 2) after section 49 of YESAA.

Thank you for taking the time to allow us to speak in person with you and for considering our concerns through this written submission.

Sincerely,



Chief Steve Smith

**CC (by e-mail):**

Members of the House of Commons Standing Committee on Aboriginal Affairs  
Yukon First Nation Chiefs  
Grand Chief Ruth Massie, Council of Yukon First Nations  
Ryan Leef, MP-Yukon  
Premier Darrell Pasloski, Yukon Government

Jean-Marie David, Clerk of the Standing Committee (also by Fax: (613) 947-3089)